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February 14, 2008

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Honorable Ross Johnson, Chairman  
& Commissioners Remy, Huguenin, Leidigh and Hodson  
Fair Political Practices Commission  
428 J Street, Suite 620  
Sacramento, CA 95814

**RE: AGENDA ITEM 16: PRE-NOTICE OF AMENDMENTS TO  
REGULATIONS 18360 AND 18361**

Dear Chairman Johnson & Commissioners:

The undersigned wishes to comment on the proposed amendments to Regulations 18360 and 18361.

While I appreciate the staff's willingness to modify some aspects of the proposed regulations, as I indicated in my remarks to the Commission at the last meeting, the changes to Reg. 18360 should only be made as part of a more comprehensive effort to review the current enforcement process and policies. I believe that the failure to engage in such a review and public discussion has resulted in a proposed regulation which, while improved from last month, continues to contain significant problems. Because no other consideration of enforcement policies and procedures is presently part of the regulatory calendar, and because I believe that adoption of changes to Reg. 18360 will inevitably preclude broader discussion of Regs. 18360.1 – 18360.8, I oppose going forward on the proposed amendment until such time as the Commission has an opportunity to receive broader public input on these issues.

With respect to Reg. 18360, the revised proposal fails to address a number of questions raised about the last version:

1) Why is an anonymous complaint process preferable to the current informal process? What is a "confidential informant" and what will justify anonymity?

2) Why has the Commission rejected the suggestion that an alleged violator be given an opportunity to respond before the 14-day decision to investigate takes place?

3) Why is an alleged violator only notified of a complaint if it is a formal complaint? While the 14-day statutory response may apply only to formal complaints, why should the alleged violator's opportunity to know of charges against him or her only apply in a formal complaint situation?

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February 14, 2008

Page 2

4) How will anonymous complaints be accounted for with respect to the proposed monthly report to the Commission? It appears to be misleading to denominate these complaints as all "Commission initiated" complaints when some percentage of them will in fact be initiated anonymously.

The revised version additionally raises some new concerns:

1) If a complainant is allowed to seek reconsideration of a decision not to investigate, an alleged violator should also be given some opportunity to respond.

2) The previous language allowed a complaint to be withheld where it threatened the investigation. The current language allows it to be withheld where "consistent with law." What law and what are the circumstances?

3) Is the monthly report to the Commission to contain only "public" information? If so, this militates in favor of notifying alleged violators of any "Commission initiated" investigations that are to be included on the list. If not, why does the Commission need additional non-public information? What non-public information about a pending investigation may be given to individual Commissioners and under what circumstances?

The revisions continue to improperly involve the Executive Director in both decision-making functions (such as the Probable Cause function delegated by the Commission) and prosecutorial or enforcement functions such as the initial determination to investigate. The problem with such a mixture of functions is that once the Executive Director has reviewed the initial complaint and evidence and authorized the investigation, he or she may be unconsciously biased toward the enforcement perspective in that case once the matter reaches him or her for a Probable cause determination.

This problem persists in the determination to pursue civil litigation. While I continue to believe that due process requires that all alleged violators be given an opportunity to respond to the complaint and a finding by a neutral fact-finder that Probable Cause exists, I also believe that the Executive Director should not act in a prosecutorial role by presenting the case for civil litigation to the Commission.

I close with my opening request – that the Commission not go forward on the proposed amendments until it undertakes a broader review and discussion of its enforcement policies and procedures, including some opportunity for input from the constituencies affected by these policies.

Respectfully submitted,

**OLSON HAGEL & FISHBURN LLP**



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